

This letter provides a brief summary of when the high rate of tax for food and the low rate of tax for food apply. See 86 Ill. Adm. Code 130.310. (This is a GIL.)

April 13, 2006

Dear Xxxxx:

This letter is in response to your letter dated November 8, 2004, in which you request information. We apologize for the delay in responding to your request. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

I am writing to request a Private Letter Ruling. Our question is whether the Company's sales of donuts and pizza are subject to Retailers' Occupation Tax (sales tax) at the reduced tax rate.

ABC owns and operates over 350 convenience stores in Illinois. ABC sells certain prepared foods, such as pizza and donuts. ABC collects and remits sales tax on the sale of both pizza and donuts.

Recently, a customer complaint precipitated a visit to a[n] ABC store by an Illinois Department of Revenue special agent. The customer had complained that ABC donuts were being taxed at the standard sales tax rate but should be taxed at the reduced sales tax rate. After visiting one of our stores, the special agent called and advised us that we should change the programming in our cash registers to charge the lower tax rate on donut sales. Subsequent to that conversation, I talked with an audit supervisor of the Department who also indicated that the reduced rate was appropriate. The audit supervisor sent copies of two letter rulings (ST 02-0187-GIL, ST 03-0110-GIL) in apparent support of the proposition that the reduced rate was applicable. After reading the rulings, however, it is not evident to me that the reduced rate is necessarily applicable to the sale of donuts.

After discussing this matter with these officials from the Department, I discovered that the Company had been audited by the Department in 2003 and that the auditor had concluded that the standard sales tax rate was applicable to sales of donuts.

Given the conflicting opinions of Department officials, I decided that it would be unwise for the Company to reduce the amount of tax collected on sales of donuts without written guidance from the Department.

ABC bakes pizza and donuts on site. Pizza and cake donuts are made 'from scratch,' i.e. the dough is mixed and ingredients are added. Other donuts are pre-made and heated in the pizza ovens for three minutes, at which time they are removed from the ovens and icing is applied to the donut.

Donuts are made in the early morning and placed in the donut case. Sometimes, more donuts are made later in the morning, such as when donut sales are heavier than expected.

Pizza is cooked throughout the day. Breakfast pizzas are made in the morning and placed in the pizza warmers for sale. Toward lunch time, the breakfast pizzas are replaced by traditional pizzas and additional pizzas are baked throughout the day and into the evening so that the displays always have pizza available. Customers may purchase one or more slices of pizza and also may order an entire pizza.

To my knowledge, the Company's Illinois stores do not have area for customers to sit and eat the products that are purchased in the store. This may change in the future.

Assuming that there is no area within a store for a customer to sit and eat the products that are purchased in the store, would the Company's donuts or pizza be subject to the reduced sales tax rate as opposed to the full rate? Would the answer change if the store installed an area for customers to sit and eat?

We appreciate your assistance and look forward to your written guidance.

DEPARTMENT'S RESPONSE:

The manner in which food is taxed depends upon the nature of the establishment that is selling the food. Retailers who provide seating or facilities for on-premises consumption of food generally incur tax at the high rate (6.25% State rate) on all food sales (including bulk or grocery type items). However, if establishments sell both food that has been prepared for immediate consumption and bulk or grocery type items and also provide facilities for on-premises consumption, the lower rate of tax may be charged on the bulk or grocery type items if the dining facilities are physically partitioned from the area where food not for immediate consumption is sold and these facilities utilize a separate means of collection of receipts. See 86 Ill. Adm. Code 130.310(b)(3).

The Department generally relies on the plain meaning of the term "physically partitioned" as in separated or divided by a tangible barrier. An eat-in area that is partially isolated from the general sales area of a store by the arrangement of display cases, service counters, and stub walls would qualify as "physically partitioned."

If establishments have no seating or facilities for on-premises consumption of food, the tax rate incurred on food sales is determined by whether the majority (over 50%) are bulk or grocery type sales or are sales for immediate consumption. If more than 50% of all food sales are for immediate

consumption, the retailer must charge the high rate on all food sales. If more than 50% of all food sales are bulk or grocery type items, all food sales are taxed at the low rate with the exception of hot foods, food that has been prepared for immediate consumption, alcoholic beverages, and soft drinks. See Section 130.310(a). Food for immediate consumption is defined in the regulation as hot food and food made ready by the retailer to be eaten without substantial delay after the final stage of preparation by the retailer. See 86 Ill. Adm. Code 130.310(b)(6). Please note, however, that Section 130.310 regarding food is currently being reviewed and some changes to the regulation are expected.

In addition to the information provided in this letter, you may wish to review Section 130.310 and the sales tax "Sunshine" letter rulings issued by the Department under the headings of "Food" or "Food, Drugs and Medicinal Appliances" located on the Department's internet website under the heading of "Laws/Regs/Rulings."

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Edwin E. Boggess
Associate Counsel

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